

February 5, 2007

Barbara A. Schermerhorn
ClerkNOT FOR PUBLICATION**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE JEFFREY L. JASPER,
Debtor.

BAP No. NM-06-092

HENRY W. TAYLOR, III,
Plaintiff – Appellee,

Bankr. No. 7-05-14282-SA
Adv. No. 05-1192-S
Chapter 7

v.

ORDER AND JUDGMENT*

JEFFREY LANE JASPER,
Defendant – Appellant.

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before BOHANON, BROWN, and THURMAN, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Appellant, Jeffrey Lane Jasper, appeals the bankruptcy court's order granting summary judgment in favor of Appellee, Henry W. Taylor, III. The bankruptcy court found that collateral estoppel prevented Appellant from

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

relitigating whether his debt to Appellee was the result of a willful and malicious injury and, therefore, non-dischargeable under 11 U.S.C. § 523(a)(6).¹ For the following reasons, we affirm the decision of the bankruptcy court.

I. Background

In November, 1992, Appellant broke Appellee's left arm and bit off the tip of Appellee's right middle finger. After a criminal jury trial in the District Court in Midland County, Texas, Appellant was found guilty of committing an aggravated assault on Appellee.²

Appellee then brought a civil action against Appellant in the Texas state court. Appellant answered the complaint and asserted a general denial.³ When the matter came on for trial, Appellant did not appear. After considering Appellee's testimony and exhibits, the court entered a judgment against Appellant for \$9,384.37 in medical expenses, \$117,308 in lost wages, \$75,000 for pain and suffering and \$75,000 in punitive damages.⁴

Appellee's attorney prepared a form of judgment, which was signed by the state court on September 3, 1996. It reiterated the above damages and contained a specific finding that "the assault committed by [Appellant] on [Appellee] was willful and malicious, and was actuated by malice[.]"⁵

Many years later, Appellant filed a Chapter 7 bankruptcy case. Appellee filed a complaint to determine that the state court judgment debt was non-dischargeable under § 523(a)(6). Appellee filed a motion for summary judgment

¹ Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

² Judgment of Conviction, *in* Appellant's Appendix ("App.") at 37.

³ Defendant's Original Answer, *in* App. at 44.

⁴ Transcript of Default Hearing held on August 13, 1996 ("Transcript") at 14, *in* App. at 78.

⁵ Judgment at 2, ¶ 3, *in* App. at 64.

claiming that the state court criminal conviction and the state court civil judgment established, through the principles of collateral estoppel, all of the elements necessary for the bankruptcy court to find that the debt was the result of a willful and malicious injury. Appellant argued that neither the criminal conviction nor the civil judgment determined that the injuries suffered by Appellee were the result of a willful and malicious injury as those terms are defined for dischargeability purposes. Appellant claimed that neither the civil action nor the criminal conviction necessarily determined that Appellant acted without just cause or excuse, and therefore maliciously, under § 523(a)(6).

In its Order granting Appellee's motion for summary judgment, the bankruptcy court found that Appellant had not complied with New Mexico Local Bankruptcy Rule 7056-1⁶ requiring a party asserting that there are material facts in dispute to refer "with particularity" to the portions of the record on which it relies. Based on Appellant's failure to so designate any portion of the record, the bankruptcy court deemed admitted all the facts identified by Appellee as undisputed.⁷ The bankruptcy court then applied Texas collateral estoppel law to the Texas criminal conviction and civil judgment and found that "the Texas judgments and transcript of the trial testimony satisfy the elements of section

⁶ This rule provides, in pertinent part:

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

⁷ Memorandum Opinion on Plaintiff's Motion for Summary Judgment ("Opinion") at 2-3, *in App.* at 103-104.

523(a)(6)”⁸ As a result, Appellant’s debt to Appellee was declared non-dischargeable.⁹

II. Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.¹⁰ A decision is considered final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”¹¹ The bankruptcy court’s order granting Appellee’s motion for summary judgment was a final order for purposes of § 158(a).¹² Appellant’s notice of appeal was timely filed within ten days of entry of the summary judgment. Neither party elected to have this appeal heard by the district court for the District of New Mexico. Thus, this Court has jurisdiction to review the order.

III. Standard of Review

We review the bankruptcy court’s summary judgment order *de novo*, applying the same standard used by the bankruptcy court under Fed. R. Civ. P. 56.¹³ When applying this standard, we examine the factual record in the light

⁸ Opinion at 10, *in App.* at 111.

⁹ In its analysis of the prior state court cases, the bankruptcy court independently analyzed whether the elements of § 523(a)(6) had been established by collateral estoppel despite the fact that it had previously ruled that Appellant had admitted these elements by his failure to comply with the local rule.

¹⁰ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

¹¹ *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (citation omitted).

¹² *Wicheff v. Baumgart (In re Wicheff)*, 215 B.R. 839, 840 (6th Cir. BAP 1998).

¹³ *United States v. Sackett*, 114 F.3d 1050, 1051 (10th Cir. 1997); *McCain Foods USA Inc. v. Shore (In re Shore)*, 317 B.R. 536, 540 (10th Cir. BAP 2004).

most favorable to the party opposing summary judgment.¹⁴

IV. Discussion

A. Appellant Failed to Demonstrate a Genuine Issue of Fact

The bankruptcy court ruled that Appellant admitted all eleven material facts listed by Appellee in its motion for summary judgment because Appellant failed to refer with particularity to any portion of the record upon which he relied to show the facts were disputed. This requirement of the New Mexico local rule regarding summary judgment procedure tracks Tenth Circuit and Supreme Court law on this issue. A party opposing a properly supported motion for summary judgment “may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial”¹⁵ The opposing party must identify facts in dispute “by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.”¹⁶ He must “do more than simply show that there is some metaphysical doubt as to the material facts.”¹⁷

Appellant failed to do this. He claimed that there was a dispute as to whether he committed an aggravated assault on Appellee, whether he intentionally caused injury to Appellee, whether he broke Appellee’s arm and bit off his finger, and whether his debt to Appellee was the result of a willful and malicious injury. He did not, however, cite to any specific portions of the record which would controvert those facts. He filed no affidavits nor any other evidence suggesting that the injuries were inflicted by someone else, were accidental, or were justified by self-defense. Appellant instead argued only that the findings of

¹⁴ *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996).

¹⁵ *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993) (citation omitted).

¹⁶ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

¹⁷ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

the Texas state court cases were unsupported. As discussed below, the transcript of the state court civil case, though sparse, did contain evidence that Appellant attacked Appellee without provocation and that Appellee was injured in the attack. Appellant's unsupported disagreement with these facts was not sufficient to demonstrate a disputed issue of material fact. The bankruptcy court correctly determined that Appellant had admitted all the material facts identified by Appellee and properly granted Appellee's motion for summary judgment in accordance with the provisions of Federal Rule of Civil Procedure 56 and New Mexico Local Bankruptcy Rule 7056-1.

B. Collateral Estoppel

Although the bankruptcy court properly determined that Appellee had admitted all of the material facts underlying Appellee's claim of willful and malicious injury, we also agree with the bankruptcy court's conclusion that these facts were established by application of the doctrine of collateral estoppel.

Collateral estoppel may be applied in bankruptcy proceedings to determine the dischargeability of a debt.¹⁸ Though a bankruptcy court ultimately determines whether or not a debt is dischargeable, the doctrine of collateral estoppel may be invoked to bar relitigation of the factual issues underlying the determination of dischargeability.¹⁹ In *In re Wallace*, the 10th Circuit cited with approval the following footnote from the Supreme Court's decision in *Brown v. Felsen*:

If, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of § 17 [the Bankruptcy Act's precursor to § 523], then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court.²⁰

¹⁸ *Grogan v. Garner*, 498 U.S. 279, 284 n.11 (1991).

¹⁹ *Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 764 (10th Cir. 1988).

²⁰ 442 U.S. 127, 139 n.10 (1979).

According to *Marrese v. American Academy of Orthopaedic Surgeons*,²¹ Texas law governs the collateral estoppel effect of a judgment from a Texas state court in a later federal proceeding. Under Texas law, the following elements must be shown in order for collateral estoppel to apply in civil cases:

(1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action.²²

There is no question that, with respect to the judgment in the state civil case, requirement number three was met. Appellant does not argue that the second factor was not met. The source of the dispute in this appeal relates only to the first factor. The question we must answer is whether the prior state court action fully and fairly litigated the facts at issue in the subsequent dischargeability case.

Under Texas principles of collateral estoppel, a default judgment entered as a result of a defendant's failure to answer is not entitled to collateral estoppel effect because none of the issues is actually litigated.²³ In contrast, a "post-answer default," which occurs when a defendant answers, but fails to appear at trial, and which enters after an evidentiary hearing at which the plaintiff offers evidence necessary to prove its case, does constitute a judicial determination of the issues. Under Texas law, a "post-answer default" meets the "fully and fairly litigated" test and is entitled to collateral estoppel effect.²⁴

In this case, the Texas state court held an evidentiary hearing upon

²¹ 470 U.S. 373, 380 (1985).

²² *In re Garner*, 56 F.3d 677, 680 (5th Cir. 1995) (citing *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)).

²³ *In re Garner*, 56 F.3d at 680; *In re Gober*, 100 F.3d 1195, 1204 (5th Cir. 1996).

²⁴ *In re Garner*, 56 F.3d at 680.

Appellant's failure to appear at the trial. Appellee testified that he had been physically assaulted and attacked by Appellant, that the attack was without provocation, and that he suffered physical injuries including a broken arm and severed finger.²⁵ Appellee testified as to the amount of his medical bills and lost wages and about the pain and suffering and mental distress caused by the assault.²⁶ After hearing this evidence, the state court entered a judgment finding that "the assault committed by [Appellant] on [Appellee] was willful and malicious and was actuated by malice[.]"²⁷

Applying the Texas principles of collateral estoppel, as set forth above, we believe that the state court civil judgment was entered upon a sufficient evidentiary hearing and that it is entitled to preclusive effect.

In cases where a party seeks to use a prior criminal conviction as collateral estoppel in a later civil case, Texas law requires the following elements to be met: (1) the issue at stake is identical to that in the criminal case; (2) the issue was actually litigated; and (3) determination of the issue was a critical and necessary part of the prior judgment.²⁸

Under Texas criminal law, a person may be convicted of aggravated assault by proof that he intentionally, knowingly, or recklessly caused serious bodily injury to another.²⁹ The criminal case, therefore, litigated the issue that Appellant caused serious bodily injuries to Appellee through his actions. Additionally, the criminal jury verdict found the Appellee guilty of aggravated

²⁵ Transcript at 5, *ll.* 1-4; 8, *ll.* 11-13; and 7, *ll.* 8-11, *in App.* at 69, 71, and 72.

²⁶ *Id.* at 5-13, *in App.* at 69-77.

²⁷ Judgment at 2, ¶ 3, *in App.* at 19.

²⁸ *Dover v. Baker, Brown, Sharman & Parker*, 859 S.W.2d 441, 447 (Tex. App. 1993).

²⁹ Tex. Penal Code Ann. §§ 22.01 and 22.02 (Vernon 1992).

assault “as alleged in the indictment.”³⁰ The indictment alleges that the Appellee “did . . . intentionally and knowingly cause serious bodily injury”³¹

In comparing the issues actually litigated and determined in the state court civil and criminal cases with the standards incorporated in the Bankruptcy Codes’s definition of willful and malicious injury under section 523(a)(6), we conclude that both the civil and criminal cases established that Appellant’s debt was non-dischargeable under this section.

In *Kawaauhau v. Geiger*,³² the Supreme Court held that section 523(a)(6) excepts from discharge only debts resulting from “acts done with the actual intent to cause injury.”³³ This court has held that a debt is non-dischargeable under § 523(a)(6) if there is proof that the debtor intended the resulting injury or that the debtor believed his actions were substantially certain to cause injury.³⁴

In the criminal case, the jury’s verdict specifically found that Appellant intentionally and knowingly caused serious bodily injury to Appellee. This satisfies *Geiger*’s requirement that Appellant intended to injure Appellee by his actions.

Additionally, the judgment in the Texas civil action found that Appellee was injured as a result of the assault by Appellant, that the assault was willful and malicious, and that it was actuated by malice. It awarded punitive damages to Appellee.

Under the Texas law in effect at the time the civil judgment was entered,

³⁰ Verdict of the Jury, *in App.* at 97.

³¹ Indictment, *in App.* at 96.

³² 523 U.S. 57 (1998).

³³ *Id.* at 61.

³⁴ *Mitsubishi Motors Credit of Am., Inc. v. Longley (In re Longley)*, 235 B.R. 651, 657 (10th Cir. BAP 1999); *see also Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004).

“malice” for purposes of punitive damages was defined as:

- (A) a specific intent by the defendant to cause substantial injury to the claimant; or
- (B) an act or omission:
 - (I) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
 - (II) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.³⁵

Subsection (A) of this definition clearly establishes the elements of a willful and malicious injury under § 523(a)(6) because it requires that the actor intended the resulting injury. An injury may also be considered willful and malicious without such direct proof of the debtor’s intent to injure if it is shown that the debtor believed his conduct was substantially certain to cause injury.³⁶ We believe that subsection (B) of the Texas definition of malice is equivalent to this indirect proof of a willful and malicious injury. It requires “actual, subjective awareness” of “an extreme degree of risk.” Actual, subjective awareness equates to knowledge.³⁷ An extreme degree of risk of harm equates to substantial certainty of injury.³⁸

Therefore, the Texas criminal verdict and the Texas civil judgment determined that Appellant’s debt to Appellee was the result of a willful and

³⁵ Tex. Civ. Prac. & Rem. Code § 41.001(7) (Vernon 2003) (This version of the definition of malice was in effect until September 1, 2003.).

³⁶ *In re Longley*, 235 B.R. at 657, recognized that the debtor’s intent to injure may be proved both directly and indirectly, citing the *Restatement (Second) of Torts* §8A (1965).

³⁷ *See, Clayton v. Wisener*, 190 S.W.3d 685, 699 (Tex. App. 2005) (“Actual awareness” means that the defendant knew about the peril.).

³⁸ *Id.* (“Extreme risk” means the likelihood of serious injury to the plaintiff.)

malicious injury by standards corresponding to those used in § 523(a)(6).

V. Conclusion

The bankruptcy court was correct in concluding that Appellant admitted all of the material facts in issue because of his failure to properly oppose the motion for summary judgment. The bankruptcy court also properly concluded that Appellant was collaterally estopped from arguing that he did not willfully and maliciously injure Appellee. Accordingly, we AFFIRM.